UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ANGELA DAWN ALLEN, Plaintiff, vs. COMMISSIONER OF SOCIAL SECURITY, Defendant.	No. 2:17-cv-00173-MKD REPORT AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ECF Nos. 14, 15

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, IT IS RECOMMENDED Plaintiff's Motion, ECF No. 14, be denied and Defendant's Motion, ECF No. 15, be granted.

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id*. at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's decision on account of an error that is harmless." *Id*. An error is harmless "where it is inconsequential to the [ALJ's] ultimate nondisability determination." *Id*. at 1115 (quotation and citation omitted). The party appealing the ALJ's decision generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

FIVE-STEP EVALUATION PROCESS

A claimant must satisfy two conditions to be considered "disabled" within the meaning of the Social Security Act. First, the claimant must be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A); 1382c(a)(3)(A). Second, the claimant's impairment must be "of such severity that [she] is not only unable to do [her] previous work[,] but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §§ 423(d)(2)(A); 1382c(a)(3)(B).

The Commissioner has established a five-step sequential analysis to determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner

considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i); 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(b); 416.920(b).

If the claimant is not engaged in substantial gainful activity, the analysis proceeds to step two. At this step, the Commissioner considers the severity of the claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the claimant suffers from "any impairment or combination of impairments which significantly limits [his or her] physical or mental ability to do basic work activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c); 416.920(c). If the claimant's impairment does not satisfy this severity threshold, however, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(c); 416.920(c).

At step three, the Commissioner compares the claimant's impairment to severe impairments recognized by the Commissioner to be so severe as to preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more severe than one of the enumerated impairments, the Commissioner must find the claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

If the severity of the claimant's impairment does not meet or exceed the severity of the enumerated impairments, the Commissioner must pause to assess the claimant's "residual functional capacity." Residual functional capacity (RFC), defined generally as the claimant's ability to perform physical and mental work activities on a sustained basis despite his or her limitations, 20 C.F.R. §§ 404.1545(a)(1); 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

At step four, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing work that he or she has performed in the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the analysis proceeds to step five.

At step five, the Commissioner considers whether, in view of the claimant's RFC, the claimant is capable of performing other work in the national economy. 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination, the Commissioner must also consider vocational factors such as the claimant's age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

Commissioner must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis concludes with a finding that the claimant is disabled and is therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1); 416.920(g)(1).

The claimant bears the burden of proof at steps one through four above. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work "exists in significant numbers in the national economy." 20 C.F.R. §§ 404.1560(c)(2); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

ALJ'S FINDINGS

On February 6, 2013, Plaintiff applied for disability insurance benefits and supplemental security income benefits, alleging a disability onset date of April 16, 2011. Tr. 185-94. Benefits were denied initially, Tr. 79-102, 131-34, and upon reconsideration. Tr. 103-30, 137-42. Plaintiff appeared for a hearing before an administrative law judge (ALJ) on September 10, 2015. Tr. 29-78. On September 23, 2015, the ALJ denied Plaintiff's claim. Tr. 8-28.

At step one, the ALJ found Plaintiff met the insured status requirements of the Social Security Act through March 31, 2015 and had not engaged in substantial gainful activity since April 16, 2011. Tr. 13. At step two, the ALJ found Plaintiff

has the following severe impairments: cervical degenerative disc disease, left knee degeneration, fibromyalgia, anxiety, depression, personality disorder, and somatoform disorder. Tr. 13. At step three, the ALJ found that Plaintiff does not have an impairment or combination of impairments that meets or medically equals the severity of a listed impairment. Tr. 14. The ALJ then concluded that Plaintiff has the RFC to perform a light work with the following limitations:

> she can stand and/or walk for only 4 hours total in an 8 hour work day; she can only occasionally push and pull with her left upper extremity; she can only occasionally use foot controls with her left lower extremity; she can only occasionally reach overhead; she can never climb ladders, ropes, or scaffolds and can perform all other postural activities only occasionally; she cannot have concentrated exposure to extreme cold, vibration, or hazards such as unprotected heights and moving mechanical parts; she is limited to simple, routine, repetitive tasks with reasoning level 2 or less; she cannot have any contact with the public and can have only superficial contact with coworkers and supervisors.

Tr. 16. At step four, the ALJ found Plaintiff was unable to perform any past relevant work. Tr. 21. At step five, the ALJ found that considering Plaintiff's age, education, work experience, and RFC, there are other jobs that exist in significant numbers in the national economy that the Plaintiff can perform such as small products assembler II, marker II, and plastics inspector. Tr. 22. The ALJ concluded Plaintiff has not been under a disability, as defined in the Social Security Act, since April 16, 2011 through the date of the decision. Tr. 22.

On March 24, 2017, the Appeals Counsel denied review, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her disability insurance benefits under Title II and supplemental security income benefits under Title XVI of the Social Security Act. ECF No. 14. Plaintiff raises the following issues for review:

1. Whether the ALJ properly weighed Plaintiff's symptom claims; and
2. Whether the ALJ properly weighed the medical opinion evidence.

See ECF No. 14 at 9.

DISCUSSION

A. Plaintiff's Symptom Claims

Plaintiff alleges the ALJ failed to rely upon clear and convincing reasons in discrediting her symptom claims. ECF No. 14 at 10. An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show

that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Id*. (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must make a credibility determination with findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony."). "The clear and convincing [evidence] standard is the most demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

In making an adverse credibility determination, the ALJ may consider, *inter alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the

claimant's testimony or between her testimony and her conduct; (3) the claimant's daily living activities; (4) the claimant's work record; and (5) testimony from physicians or third parties concerning the nature, severity, and effect of the claimant's condition. *Thomas*, 278 F.3d at 958-59.

The ALJ found that Plaintiff's medically determinable impairments could cause Plaintiff's alleged symptoms, but that Plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms were not entirely credible. Tr. 17. The ALJ partially credited Plaintiff's symptom complaints in finding her more limited than described by the state agency physicians, but the ALJ discredited Plaintiff's testimony to the extent she alleged her symptoms were totally disabling. Tr. 20. The undersigned concludes the ALJ provided specific, clear, and convincing reasons for this finding.

1. Daily Activities

The ALJ found that Plaintiff's "described daily activities…are not limited to the extent one would expect, given the complaints of disabling symptoms and limitations." Tr. 20. A claimant's daily activities may support an adverse credibility finding if (1) the claimant's activities contradict her other testimony, or (2) the claimant "is able to spend a substantial part of [her] day engaged in pursuits involving performance of physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (*citing Fair v. Bowen*,

885 F.2d 597, 603 (9th Cir. 1989)). It is reasonable for an ALJ to consider a claimant's activities which undermine claims of totally disabling pain in making the credibility determination. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). However, it is well-established that a claimant need not be "utterly incapacitated" to be eligible for benefits. *Fair*, 885 F.2d at 603.

In support of the finding, the ALJ noted that Plaintiff's "ability to handle her own personal care, prepare simple meals, do light housework, go out alone, drive, shop in stores, and handle her finances are not consistent with her testimony regarding debilitating anxiety and extensive body pains." Tr. 20. Plaintiff testified she normally leaves the house 10-15 days out of the month and she is able to drive herself to her appointments, drive her mother to her appointments, and sometimes she'll drive to the park. Tr. 58. Plaintiff lives with her mother and reported that she helps take care of her mother's medical issues as well. Tr. 558. As far as housework, Plaintiff claimed she was able to clean, do laundry, vacuum, and dust, Tr. 236, chores she shares with her mother. Tr. 69-70. Plaintiff also reported that she is a compulsive organizer. Tr. 543.

Importantly, the ALJ did not equate these activities with the ability to perform full-time substantial gainful activity, nor did the ALJ base his finding of nondisability exclusively on Plaintiff's daily activities. Instead, the ALJ permissibly relied on this evidence, in part, to reject Plaintiff's contention that her

reported symptoms of pain and anxiety (which included, for example, panic attacks, Tr. 201, self-isolation, Tr. 239, difficulty concentrating, Tr. 234, and nervousness around others, Tr. 240) substantially limit her functioning to the point of "debilitat[ion]." Tr. 20. *See Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009); *Molina*, 674 F.3d at 1113 ("[e]ven where [Plaintiff's] activities suggest some difficulty functioning, they may be grounds for discrediting the claimant's testimony to the extent that they contradict claims of a totally debilitating impairment."); *Burch*, 400 F.3d at 679 (holding that the ALJ did not err in finding that the claimant's ability to care for her own personal needs, cook, clean, shop, interact with family, and manage her finances suggested that the claimant "was quite functional" and undermined the alleged severity of her impairments). As in *Molina*, Plaintiff's daily activities are relevant to the alleged degree of severity of Plaintiff's specific symptoms including allegedly debilitating panic attacks, anxiety affecting her ability to engage in human interaction, and pain. Although the evidence of Plaintiff's daily activities could form the basis of an interpretation more favorable to Plaintiff, the ALJ's interpretation was rational, and the Court must uphold the ALJ's decision where the evidence is susceptible to

more than one rational interpretation." *See Burch*, 400 F.3d at 680-81 (internal quotation marks and alterations omitted).

2. Inconsistent Medical Evidence

The ALJ also concluded that the medical evidence does not support the degree and severity of the Plaintiff's alleged symptoms. Tr. 20. An ALJ may not discredit a claimant's pain testimony and deny benefits solely because the degree of pain alleged is not supported by objective medical evidence. *Rollins*, 261 F.3d at 856; *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601. Medical evidence is a relevant factor, however, in determining the severity of a claimant's pain and its disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 416.929(c)(2). Minimal objective evidence is a factor which may be relied upon in discrediting a claimant's testimony, although it may not be the only factor. *See Burch*, 400 F.3d at 680.

The ALJ provided a summary of the medical record in his decision and specifically remarked that the medical opinions of testifying medical experts Drs. Klein and Martin, "demonstrate that the claimant's allegations are not fully credible." Tr. 20. Both Drs. Klein and Martin reviewed the longitudinal record, were subject to cross-examination, and concluded the evidence was inconsistent with disabling impairment. Tr. 38-40; Tr. 47-51. Notably, none of Plaintiff's treating or examining physicians and none of the medical experts opined that

Plaintiff was disabled by pain from any source. Plaintiff generally asserts "[t]his is insufficient rationale for a credibility determination," but does not cite to any specific portion of the record to contest the ALJ's reasoning. ECF No. 14 at 11.

The ALJ's reasons are supported by substantial evidence and together constitute a sufficient basis for discounting Plaintiff's allegations of debilitating pain and anxiety. As noted above, credibility determinations are within the province of the ALJ's responsibilities and it is not the reviewing court's role to disturb that determination unless it appears the ALJ arbitrarily discredited Plaintiff's symptom claims. *Orteza v. Shalala*, 50 F.3d 748, 750 (9th Cir. 1995). Where, as here, the ALJ has made specific findings justifying a decision to partially discredit Plaintiff's testimony regarding debilitating symptoms, and those findings are undisputedly supported by substantial evidence, the Court's role is not to second-guess that decision.

B. Medical Opinion Evidence

Plaintiff contends the ALJ improperly weighed the medical opinions of Howard Kenney, M.D., Frank Rosekrans, Ph.D., Marian Martin, Ph.D., Sandra Crowley, LMHC, and Rebecca Reidy, ARNP. ECF No. 14 at 11-17.

There are three types of physicians: "(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant

but who review the claimant's file (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted). "Generally, a treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion carries more weight than a reviewing physician's." *Id.* "In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists." *Id.* (citations omitted).

If a treating or examining physician's opinion is uncontradicted, an ALJ may reject it only by offering "clear and convincing reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). "However, the ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory and inadequately supported by clinical findings." *Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may only reject it by providing specific and legitimate reasons that are supported by substantial evidence." *Bayliss*, 427 F.3d at 1216 (*citing Lester*, 81 F.3d at 830-31 (9th Cir. 1995)).

1. Howard Kenney, M.D.

Dr. Kenney treated Plaintiff at Arthritis Northwest in 2014 and 2015. He diagnosed Plaintiff with arthralgia and myalgia after tests did not reveal an underlying autoimmune or inflammatory joint disease. Tr. 434; 528. After remarking there was "very little on physical examination," Tr. 517, Dr. Kinney concluded that Plaintiff's somatoform pain disorder and "psychiatric issues are adding significantly to her pain." Tr. 434; *see* Tr. 517-18; 524. In April 2014, Dr. Kinney's treatment note stated: "Cognitive behavioral therapy is one form of effective therapy although with this patient's history and long-standing symptoms as well as childhood abuse I think give her a very poor prognosis. She also has very little depth of understanding about chronic pain issues." Tr. 517. In 2015, Dr. Kenney noted Plaintiff was "tremendously better" since having been on Cymbalta. Tr. 528. The ALJ's opinion clearly indicates he considered the treatment notes of Dr. Kenney, but the ALJ did not assign a specific weight to them. Tr. 18.

Plaintiff argues it was error for the ALJ to reject Dr. Kenney's statements regarding his belief about her prognosis in cognitive therapy and Plaintiff's depth of understanding about chronic pain. However, treatment notes, in general, do not constitute medical opinions. *See* 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2) ("Medical opinions are statements from acceptable medical sources that reflect

judgments about the nature and severity of your impairment(s), including your symptoms, diagnosis and prognosis, what you can still do despite impairment(s), and your physical or mental restrictions."). The Ninth Circuit has found no error in ALJ decisions that do not weigh statements within medical records when those records do not reflect physical or mental limitations or otherwise provide information about the ability to work. *See, e.g., Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (where a physician's report did not assign any specific limitations or opinions regarding the claimant's ability to work, "the ALJ did not need to provide 'clear and convincing reasons' for rejecting [the] report because the ALJ did not reject any of [the report's] conclusions.").

Dr. Kenney's comments on the potential effectiveness of cognitive therapy and Plaintiff's depth of knowledge about chronic pain, do not offer opinions regarding Plaintiff's limitations or ability to work. Accordingly, his treatment notes do not constitute medical opinions the ALJ must weigh and Plaintiff fails to establish that the ALJ neglected to account for any established limitations. Even if they constituted medical opinions, it is not apparent how the ALJ's failure to assign a specific weight to the statements, after clearly considering Dr. Kenney's records, had any effect on the ultimate decision. Indeed, Dr. Kenney's opinion regarding the potential effectiveness of cognitive therapy does not detract from Dr.

Kenney's later remark that she was "tremendously better" following his treatment with Cymbalta. Tr. 528.

Accordingly, the ALJ did not err by failing to assign a weight to the treatment notes of Dr. Kenney.

2. Frank Rosekrans, Ph.D.

Dr. Rosekrans completed psychological assessments of Plaintiff in 2013 and in 2015. Tr. 381-90; 542-46. In the evaluation conducted in January 2013, Dr. Rosekrans indicated Plaintiff experienced a severe limitation in her ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances without special supervision; a marked limitation in the ability to perform routine tasks without special supervision; a marked limitation in the ability to communicate and perform effectively in a work setting; and a marked limitation in the ability to maintain appropriate behavior in a work setting. *Id.* The ALJ rejected these limitations, in part based on the opinion of Dr. Martin, who testified Plaintiff was only moderately limited by her psychological impairments. Tr. 19. Because Dr. Rosekrans' opinion is contradicted, the ALJ need only have provided specific and legitimate reasons for rejecting it. *Bayliss*, 427 F.3d at 1216.

First, the ALJ assigned little weight to Dr. Rosekrans' assessed limitations because they were inconsistent with Dr. Rosekrans' other findings. Tr. 19. An opinion inconsistent with the evidence of record and treatment notes constitutes a

specific and legitimate reason for discounting a physician's opinion. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008); *see also Bayliss*, 427 F.3d at 1216 (permitting ALJ to reject physician's assessment when contradicted by physician's own observations). Here, the ALJ noted that Dr. Rosekrans had observed Plaintiff had normal thought process and content, orientation, perception, memory, fund of knowledge, concentration, abstract thought, insight, and judgment. Tr. 19 (citing Tr. 385). The ALJ could reasonably interpret Plaintiff's performance on the mental status examination as inconsistent with Dr. Rosekrans' opined limitations. *Tommasetti*, 533 F.3d at 1038.

Further, the ALJ correctly observed Dr. Rosekrans did not explain the basis for many of his severe and marked limitations, especially those which were inconsistent with her mental status examination results. Tr. 19. An ALJ may properly discount a doctor's opinion when it is brief, conclusory, and inadequately supported by clinical findings or by the record as a whole. *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (*citing Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Thomas*, 278 F.3d at 957. Individual medical opinions are preferred over check-box reports. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). An ALJ may permissibly reject check-box reports that do not contain any explanation of the bases for their conclusions. *Crane*, 76 F.3d at 253. However, if treatment

notes are consistent with the opinion, a check-box form may not automatically be rejected. *See Garrison*, 759 F.3d at 1014 n. 17. Here, Dr. Rosekrans provided his opinion on a form which includes check boxes assessing various limitations but very little explanation as to the basis for this assessment. The only narrative explanation for the limitations assessed were his clinical findings that: "[s]he is severely depressed. She reports feelings of sadness, loss, worthlessness, hopelessness, and personal failure. She has lost interest in activities that she used to enjoy."; "[s]he reports anxiety with agoraphobia, is afraid to go out alone, and her activities and job search are restricted; and "[s]pends too much time organizing, for example turning all labels to the front, becomes too anxious if she cannot do compulsive behaviors." Tr. 382. The lack of explanation for the severe limitations assessed is a specific and legitimate reason to accord Dr. Rosekrans' opinion less weight. *Batson*, 359 F.3d at 1195 (9th Cir. 2004); *Garrison*, 759 F.3d at 1014 (9th Cir. 2014).

Plaintiff faults the ALJ for disregarding the Personality Assessment Inventory (PAI) test Dr. Rosekrans administered. ECF No. 14 at 13-15. Dr. Rosekrans' narrative about the PAI states "[i]t is a good description of her. It was very valid." Tr. 382. The PAI is a personality test based on self-reporting. It is a diagnostic tool based on Plaintiff's subjective responses. Tr. 388-89. The report itself indicates Dr. Rosekrans utilized the tool for this purpose and to assist with

future diagnosis, advising that it "may help to clarify the presenting clinical picture." Tr. 390 (noting the clinical profile "increase[ed] the possibility of multiple diagnoses"). It does not identify functional limitations or corroborate them. ALJs "need not discuss all evidence presented to [them]. Rather, [they] must explain why significant probative evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1393, 1394–95 (9th Cir. 1984) (internal quotation marks omitted). While the PAI may have been probative, it was not significant, and therefore the ALJ did not error in failing to discuss the PAI.

Finally, the ALJ concluded that Dr. Rosekrans' opinion was "inconsistent with the medical evidence of record as a whole and Dr. Martin's opinion, which reflects that the claimant's psychological symptoms are controlled with treatment." Tr. 19. An ALJ may reject limitations "unsupported by the record as a whole." *Batson*, 359 F.3d at 1195. The specific and legitimate reason standard can be met by "setting out a detailed and thorough summary of the facts and conflicting clinical evidence, [the ALJ] stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). In addition, the effectiveness of medication and treatment is a relevant factor in determining the severity of a claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3); 416.929(c)(3); *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006)

(conditions effectively controlled with medication are not disabling for purposes of determining eligibility).

The ALJ's decision summarized Dr. Martin's opinion indicating that "many counseling records noted that the claimant was improving and her medications were helping her depression and sleep and keeping her moods stable, at some points feeling good enough to attempt part-time work." Tr. 19. The ALJ further explained that Dr. Martin had opined that "with counseling and medication, [Plaintiff's] anxiety and depression appear to be well-managed and mild at times." Tr. 19. Dr. Martin opined Plaintiff could perform simple, routine, repetitive tasks and would be best working away from the general public, with superficial contact with co-workers and supervisors. *Id*.

Plaintiff contends Dr. Rosekrans' opinion is consistent with other evidence in the record including treatment records from her counselors, Sandra Crowley, M.D., Tr. 345-47, Brenda Shanley, ARNP, Tr. 367-78, and Frontier Behavioral Health, Tr. 548-58, and her primary care provider at Associated Family Physicians, Tr. 463-99. Plaintiff does not cite any record ignored by the ALJ or specifically analyze the cited medical evidence. ECF No. 16 at 3. Even the evidence Plaintiff relies upon, however, provides support for Dr. Martin's opinion based upon reasonable inferences from the record that Plaintiff received benefit from treatment through medication and counseling. *See* Tr. 373 ("things are better. Able to sleep

better, approx. 8-10 hrs! [decreased] anxiety…."; Tr. 345 ("anxiety and depression improving"); Tr. 468 (noting "progress" in counseling for anxiety and PTSD and "fewer panic attacks"); Tr. 477 (assessing generalized anxiety disorder "[w]ell [c]ontrolled"); Tr. 498 (visit for "OCD/anxiety" noting "[m]edications keeping it stable, but needs continued counseling").

It is well established that the ALJ is responsible for resolving conflicts in medical testimony. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). Moreover, an ALJ may choose to give more weight to an opinion that is more consistent with the evidence in the record. 20 C.F.R. § 416.927(c)(4) ("the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion"). Plaintiff's argument does not warrant a reversal or remand of the ALJ's decision because it amounts to no more than a dispute about the ALJ's interpretation of the evidence, and "[w]here evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld." *Burch*, 400 F.3d at 679.

The ALJ's reliance upon internal inconsistencies, inadequate support, and inconsistency with the record as whole, were specific and legitimate reasons supported by substantial evidence for according little weight to Dr. Rosekrans' opinion.

3. Marian Martin, Ph.D.

Plaintiff generally contends that the ALJ erred by relying on the opinion of testifying psychological expert Dr. Martin. ECF No. 14 at 16. Plaintiff contends that the opinion of a non-examining source "cannot itself constitute substantial evidence that justifies the rejection of either an examining physician or a treating physician." *Id*. at 17. However, the opinion of a non-examining expert "may constitute substantial evidence when it is consistent with other independent evidence in the record." *Tonapetyan*, 242 F.3d at 1149. Moreover, because a testifying medical expert is subject to cross-examination, his opinion may be given greater weight. *Andrews v Shalala*, 53 F.3d 1035, 1042 (9th Cir. 1995).

Here, the ALJ did not rely solely upon the opinion of Dr. Martin, but also substantial evidence identified and thoroughly discussed at the administrative hearing, including on cross-examination. Tr. 44-52. Moreover, as noted by the ALJ, Dr. Martin is a board certified psychologist with expertise in evaluating medical issues in disability claims who was the only mental health professional to have reviewed all of the relevant medical evidence submitted prior to the hearing. Tr. 19, 43. Under the regulations, the ALJ could properly credit Dr. Martin's opinion on account of her expertise. *See* 20 C.F.R. § 416.927(c)(5) ("We generally give more weight to the medical opinion of a specialist about medical issues related to his or her area of speciality than to the medical opinion of a source who

is not a specialist."). Moreover, the ALJ noted that Dr. Martin's opinion was supported by a "thorough explanation." Tr. 19. Plaintiff does not dispute this finding, nor does Plaintiff otherwise identify any aspect of Dr. Martin's opinion that is not supported by substantial evidence in the record. Thus, no error has been shown.

4. Rebecca Reidy, ARNP and *Sandra Crowley, LMHC*

Under the Social Security regulations in effect at the time of the ALJ's decision, mental health therapists and nurse practitioners were considered an "other source" of information and not an "acceptable medical source." 20 C.F.R. §§ 404.1513(a), (d), 416.913(a), (d) (amended March 27, 2017). Opinions of "other sources," are not entitled to the same deference. *Molina*, 674 F.3d at 1111. The ALJ may discount opinions from "other sources" if the ALJ gives "germane reasons" for doing so. *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993).

In August 2010, the State of Washington's Department of Social and Health Services sent a request to ARNP Reidy to evaluate Plaintiff's functional limitations. Ms. Reidy completed a functional assessment form stating that because of depression and anxiety, Plaintiff would be unable to work for six months. Tr. 337-38. The ALJ assigned this opinion little weight. Tr. 20.

First, the ALJ concluded that the assessment "is not supported by explanation." Tr. 20. A medical opinion may be rejected by the ALJ if it is

conclusory or inadequately supported. *Bray*, 554 F.3d at 1228; *Thomas*, 278 F.3d at 957. Individual medical opinions are preferred over check-box reports. See *Crane*, 76 F.3d at 253; *Murray v. Heckler*, 722 F.2d 499, 501 (9th Cir. 1983). An ALJ may permissibly reject check-box reports that do not contain any explanation of the bases for their conclusions. *Crane*, 76 F.3d at 253. Ms. Reidy's form assessment notes that Plaintiff is "very stressed," has "anxiety with thought of leaving house and going to unfamiliar surrounding[s]," and has difficulty working with other people, focusing, and carrying out tasks. Tr. 337. The record contains no other contemporaneous treatment notes from Ms. Reidy or her office. The ALJ's conclusion that Ms. Reidy's opinion was inadequately explained is a germane reason for rejecting her opinion that Plaintiff could not work. *See Belcher v. Berryhill*, 707 Fed.Appx. 439, 441 (9th Cir. 2017) (unpublished) (finding ALJ gave germane reasons for rejecting opinion that was inadequately explained).

Next, the ALJ noted that Ms. Reidy's opinion "precedes Plaintiff's alleged date of onset." Tr. 20. Medical opinions that predate the alleged onset of disability are of limited relevance. *See Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1165 (9th Cir. 2008). Ms. Reidy's assessment occurred nine months prior to Plaintiff's alleged onset and indicated Plaintiff's limitations were not expected to last beyond six months, therefore, it does not reflect functioning

during the relevant period. This was another germane reason for rejecting Ms. Reidy's assessment under *Carmickle*.

Finally, the ALJ concluded that Ms. Reidy's opinion was rendered when Plaintiff "was sustaining work at the level of substantial gainful activity." Tr. 20. Plaintiff contends her 2010 earnings of less than $4,000 did not rise to the level of "substantial gainful activity." ECF No. 14 at 16. The Court need not address this contention because any error in the ALJ's assessment of Plaintiff's level of work is harmless. As discussed above, the ALJ cited other germane reasons, which support the ALJ's rejection of the evidence. *Tommasetti*, 533 F.3d at 1038.

Sandra Crowley, LMHC, was Plaintiff's treating mental health counselor from 2005-2006, 2010-2011, and 2013-2014. Tr. 305-33, 334-36, 340-44, 345-47, 348-60, 441-54. In 2011, Ms. Crowley noted Plaintiff's anxiety and depression were "improving," but that Plaintiff was still having difficulty getting up and going and reportedly did not feel she could lift much weight. Tr. 345. Ms. Crowley noted Plaintiff should be limited to 11-20 hours per week of work and this limitation would likely extend 3-6 months. Tr. 346. In September 2006, Ms. Crowley indicated Plaintiff's depression and agoraphobia caused limitations in energy and focus (which were improving) and she agreed that "20 hours per week would be a good target to aim for." Tr. 308. She did not expect the condition to last more than 12 months. Tr. 309. In August 2006, Ms. Crowley noted Plaintiff

was motivated to overcome anxiety and return to work. Tr. 305. In June 2005, Ms. Crowley indicated in correspondence that she was working to assist Plaintiff in reducing symptoms of anxiety and depression that are preventing her from work and she hoped she could be ready to return to work by August or September. Tr. 320. The ALJ assigned Ms. Crowley's opinions "little weight." Tr. 20.

First, the ALJ concluded Ms. Crowley's opinions were not consistent with the record as a whole, including the well-reasoned opinion of Dr. Martin." Tr. 20. The social security regulations state provide that generally, the more consistent a medical opinion is with the record as a whole, the more weight it is assigned. *See* 20 C.F.R. § 404.1527(c)(4), (f)(1). An ALJ may reject an opinion that is inconsistent with the record as a whole. *Batson*, 359 F.3d at 1195.

Plaintiff contends the "ALJ fail[ed] to explore or discuss LMHC Crowley's records, which more than adequately support the opinions she formulated over a decade." ECF No. 14 at 15. Plaintiff does not cite to any particular portion of the record or otherwise develop this assertion. To be clear, Ms. Crowley counseled Plaintiff intermittently, not consistently, over the course of ten years. These records were received and reviewed by Dr. Martin and by the ALJ. Plaintiff's counsel even specifically questioned Dr. Martin about the record as far of Plaintiff's symptoms of anxiety and panic attacks. Tr. 50. Dr. Martin testified that "the counselor notes, a lot of times, . . . said she was improving, doing better, you

know, having reduced symptoms and, at one point, was actually feeling more like she could go out and do some part-time work. So I think they were looking at getting her out more. She was, apparently, making progress." Tr. 51. Dr. Martin also the referred to the April 2013 progress note from her primary care provider, Jeffrey Markin, M.D., where Plaintiff had reported she was "[g]enerally feeling well. Some anxiety at times and insomnia." Tr. 413. At the visit, Dr. Markin renewed Plaintiff's prescriptions for Trazodone and Cymbalta and recommended "lifestyle modifications to include regular aerobic exercise." Tr. 415. At Plaintiff's subsequent follow up visit, the progress note indicated Plaintiff was "sleeping ok once getting to sleep but still trouble initiating" and she was referred for additional counseling. Tr. 412. Nothing in Ms. Crowley's counseling session notes from 2013-2014, Tr. 441-453, suggest Plaintiff is unable to work. Tr. 453 (noting most troublesome symptoms are depression, restless sleep, and lack of resilience). The ALJ's interpretation of the medical evidence in light of the medical expert's opinion and in light of the whole record, was reasonable. Where the evidence is "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina*, 674 F.3d at 1111. Accordingly, inconsistency with the record was a sufficiently "germane" reason for discounting Ms. Crowley's opinions. *See Molina*, 674 F.3d at 1112 (ALJ provided germane reason where

"other source" opinion was inconsistent with a psychiatrist's opinion, which was entitled to greater weight).

Second, the ALJ assigned Ms. Crowley's opinions little weight because "as a whole, . . . they are not supported by explanation." Tr. 20. Because the ALJ has already provided one germane reason, the Court need not address the ALJ's additional reasoning.

Plaintiff also contends that Ms. Reidy and Ms. Crowley were not discounted by the ALJ as "other sources," therefore this Court "may not" have the ability to assess whether proper weight was given and any rejection of the evidence must be supported by specific and legitimate reasons. ECF No. 16 at 4; ECF No. 14 at 16. Plaintiff is incorrect. The "other source" designation is a regulatory classification which an ALJ must consider. SSR 06-03P, 2006 WL 2329939, at *6 (Aug. 9, 2006). However, it is not a requirement that the ALJ explain the classifications in the decision. Rather, the ALJ is to consider all relevant evidence in the record, including the source's qualifications, and "generally should explain the weight given to opinions from these 'other sources,' or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinion may have an effect on the outcome of the case." *Id.* Here, the ALJ specifically acknowledged Ms. Reidy as a nurse practitioner and Ms. Crowley as a "counseling

professional," and discussed their opinions in light of the entire record. Tr. 20. Thus the ALJ's decision demonstrates that he evaluated and rejected their opinions on their merits. Accordingly, any alleged error in setting forth their classification was "inconsequential to the ultimate nondisability determination." *Tommasetti*, 533 F.3d at 1038 (internal quotations omitted).

CONCLUSION

Having reviewed the record and the ALJ's findings, this court concludes the ALJ's decision is supported by substantial evidence and free of harmful legal error.

Accordingly, **IT IS HEREBY RECOMMENDED**:

1. Plaintiff's Motion for Summary Judgment, ECF No. 14, be **DENIED**.

2. Defendant's Motion for Summary Judgment, ECF No. 15, be **GRANTED**.

OBJECTIONS

Any party may object to a magistrate judge's proposed findings, recommendations or report within **fourteen (14)** days following service with a copy thereof. Such party shall file written objections with the Clerk of the Court and serve objections on all parties, specifically identifying the portions to which objection is being made, and the basis therefor. Any response to the objection shall be filed within **fourteen (14)** days after receipt of the objection. Attention is

directed to Federal Rule of Civil Procedure 6(d), which adds additional time after certain kinds of service.

A district judge will make a *de novo* determination of those portions to which objection is made and may accept, reject or modify the magistrate judge's determination. The judge need not conduct a new hearing or hear arguments and may consider the magistrate judge's record and make an independent determination thereon. The judge may, but is not required to, accept or consider additional evidence, or may recommit the matter to the magistrate judge with instructions. *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Civ. P. 72; LMR 4, Local Rules for the Eastern District of Washington.

A magistrate judge's recommendation cannot be appealed to a court of appeals; only the district judge's order or judgment can be appealed.

The District Court Executive is directed to enter this Report and Recommendation, forward a copy to Plaintiff and counsel, and **SET A CASE MANAGEMENT DEADLINE ACCORDINGLY.**

DATED May 11, 2018.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES MAGISTRATE JUDGE